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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 MICHELLE ERNST,)
11 Plaintiff,) No. CV-05-0194-MWL
12 v.) ORDER GRANTING PLAINTIFF'S
13 JO ANNE B. BARNHART,) MOTION FOR SUMMARY JUDGMENT
14 Commissioner of Social) AND REMANDING FOR AN
15 Security,) IMMEDIATE AWARD OF BENEFITS
16 Defendant.)

17 BEFORE THE COURT are cross-motions for summary judgment,
18 noted for hearing without oral argument on February 27, 2006. (Ct.
19 Rec. 12, 15). Plaintiff Michelle Ernst ("Plaintiff") filed a
20 reply brief on January 18, 2006. (Ct. Rec. 17). Attorney Maureen
21 Rosette represents Plaintiff; Special Assistant United States
22 Attorney David M. Blume represents the Commissioner of Social
23 Security ("Commissioner"). The parties have consented to proceed
24 before a magistrate judge. (Ct. Rec. 7). After reviewing the
25 administrative record and the briefs filed by the parties, the
26 Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12)
27 and remands for an immediate award of benefits. The Court **DENIES**
28 Defendant's Motion for Summary Judgment. (Ct. Rec. 15).

JURISDICTION

On March 12, 2002, Plaintiff filed an application for Supplemental Security Income ("SSI") benefits, alleging disability since October 1999, due to neurological problems, pain in her neck, shoulders, arms and back of head, dizziness, lack of balance, numbness in arms and head, sinus and heart problems and mild depression. (Administrative Record ("AR") 68-70, 81, 103). The application was denied initially and on reconsideration.

On December 9, 2003, Plaintiff appeared before Administrative Law Judge ("ALJ") Mary B. Reed, at which time testimony was taken from Plaintiff, medical expert Glen A. Almquist, M.D., and vocational expert Deborah LaPoint. (AR 340-403). On November 3, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 14-26). The Appeals Council denied a request for review on May 16, 2005. (AR 6-9). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on June 27, 2005. (Ct. Rec. 1).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 35 years old on the date of the ALJ's decision. (AR 14). She completed the tenth grade in school and has past relevant work as a grocery store clerk. (AR 87, 369-370). Plaintiff indicated that she also cleaned homes for elderly people in 1990 and 1991.

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1 (AR 82, 370). She stated that she stopped working in April 1994
2 when she became pregnant. (AR 81).

3 At the administrative hearing held on December 9, 2003,
4 Plaintiff testified that she stands approximately five feet tall
5 and weighs about 220 pounds. (AR 368). She stated that she
6 weighed about 170 pounds prior to hurting her neck and had gained
7 weight due to immobility. (AR 368). She indicated that she
8 completed the ninth grade and never received a GED. (AR 369).

9 Plaintiff testified that she worked as a clerk/bagger at a
10 grocery store and her responsibilities included bagging groceries,
11 stocking shelves and carrying groceries out to cars. (AR 369).
12 In 1990 and 1991 she assisted elderly people by cleaning their
13 homes. (AR 370). She indicated that, about a year and a half
14 prior to the hearing, in 2001, she attempted cleaning homes and
15 doing light yard work, but quit after a couple of weeks when it
16 aggravated her lower back. (AR 370).

17 Plaintiff reported that she was in an automobile accident
18 when she was 15 years old, and all the vertebrae in her neck were
19 fractured as a result of the accident. (AR 371). She testified,
20 however, that she felt fine until 1999 when she began having pain
21 in her head and neck. (AR 372). She stated that, since that
22 time, she has constant headaches which last all day and range from
23 mild to rather severe. (AR 372-373). She indicated that she has
24 severe headaches about once every couple of days and they last
25 from an hour or two to several days. (AR 373). She stated that
26 medications do not alleviate her severe headaches. (AR 373).

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1 With regard to neck pain, Plaintiff testified that she can
2 feel deep pain on both sides of her neck and, on a scale of one to
3 10, she indicated that the severe pain in her neck rates as a 12.
4 (AR 373). Again, medication reportedly did not alleviate the pain
5 in her neck. (AR 373). She has been wearing a neck collar, off
6 and on, for several years. (AR 374). She stated that it helps
7 with the pain some days, but other days it did not. (AR 374).
8 Besides medication and the neck collar, Plaintiff also uses heat
9 and ice daily in an attempt to alleviate pain. (AR 375).

10 Plaintiff indicated that she has a decreased range of motion with
11 her neck and turning to look left or right caused pain. (AR 375).

12 Plaintiff testified that she also has problems with her left
13 arm and hand. (AR 376). Since 1999, her left hand has had a
14 constant tingling sensation in the middle and ring fingers and
15 pinky. (AR 376). She experiences the same type of tingling
16 sensation with her right hand, but very infrequently. (AR 377).

17 Plaintiff stated that she injured her low back while working
18 at the grocery store in the early 1990s. (AR 377-378). The
19 attempt to clean homes in 2001 aggravated the low back problems.
20 (AR 378). The back problems make it difficult for her to walk and
21 lift. (AR 378). She described the low back pain as a sharp pain
22 that runs across her whole lower back, into both hips, both thighs
23 and her buttocks. (AR 378). It also affects her sleep as she
24 experiences waking pain in both legs down to her ankles. (AR
25 379). Plaintiff testified that she wakes up about every 45
26 minutes due to the pain and she is only able to get a total of
27 maybe four hours of sleep a night. (AR 383). Because of

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1 difficulty sleeping at night, Plaintiff stated that she naps an
2 hour or two in the morning, an hour or two in the afternoon, an
3 hour in the evening and a couple of hours at night. (AR 384).

4 She indicated that she could bend if performed slowly and
5 could sit a couple of minutes before needing to shift her
6 position. (AR 379-380). Plaintiff stated that if she sat in one
7 position for longer than five to 10 minutes, her legs would go
8 numb. (AR 393). She testified that could stand in one spot for
9 five to ten minutes at a time and could walk about 300 feet in one
10 stretch. (AR 382). She indicated that the maximum she could lift
11 and carry is probably five pounds. (AR 382).

12 Plaintiff stated that she had ridden in a car for two hours
13 in order to attend the administrative hearing. (AR 380-381). She
14 does not drive because it causes her pain and it is not safe
15 because she cannot turn her head very well. (AR 381).

16 Plaintiff testified that she typically spends her time
17 sleeping and watching television. (AR 383). She reported she is
18 able to do housework and chores, but only in very small
19 increments. (AR 383). A couple of months prior to the hearing,
20 Plaintiff stated that she had been attempting to do 30 minutes of
21 aerobic exercise, three times a week. (AR 385). She leaves the
22 house only to attend her monthly doctor's appointment and to go
23 grocery shopping. (AR 389). She indicated that she helps her son
24 with school work, attempts to do a little hand sewing and
25 crocheting, and reads a little. (AR 389-390).

26 Plaintiff stated that she home-schools her nine-year-old son.
27 (AR 390). They spend 10 to 15 minutes at a time doing school

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1 work, several times during the day. (AR 390). She indicated that
2 they spend a total of about two hours doing school work each day.
3 (AR 391).

4 Plaintiff testified that she switched from OxyContin to
5 methadone for pain and, at first, experienced dizziness from the
6 methadone. (AR 385-386). She opined that the methadone provided
7 improved pain relief over the OxyContin. (AR 386). She also
8 takes Effexor for depression, lorazepam for panic attacks, and
9 propranolol for heart arrhythmia. (AR 387-388). She stated that
10 she has a panic attack about twice a week, and had experienced
11 panic attacks for about 10 years. (AR 387).

12 Medical expert Glen A. Almquist and vocational expert Deborah
13 LaPoint also testified at the administrative hearing held on
14 December 9, 2003. (AR 346-367, 397-401).

15 SEQUENTIAL EVALUATION PROCESS

16 The Social Security Act (the "Act") defines "disability" as
17 the "inability to engage in any substantial gainful activity by
18 reason of any medically determinable physical or mental impairment
19 which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than
21 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
22 Act also provides that a Plaintiff shall be determined to be under
23 a disability only if any impairments are of such severity that a
24 Plaintiff is not only unable to do previous work but cannot,
25 considering Plaintiff's age, education and work experiences,
26 engage in any other substantial gainful work which exists in the
27 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

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1 Thus, the definition of disability consists of both medical and
2 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
3 (9th Cir. 2001).

4 The Commissioner has established a five-step sequential
5 evaluation process for determining whether a person is disabled.
6 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
7 is engaged in substantial gainful activities. If so, benefits are
8 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
9 not, the decision maker proceeds to step two, which determines
10 whether Plaintiff has a medically severe impairment or combination
11 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
12 416.920(a)(4)(ii).

13 If Plaintiff does not have a severe impairment or combination
14 of impairments, the disability claim is denied. If the impairment
15 is severe, the evaluation proceeds to the third step, which
16 compares Plaintiff's impairment with a number of listed
17 impairments acknowledged by the Commissioner to be so severe as to
18 preclude substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
20 App. 1. If the impairment meets or equals one of the listed
21 impairments, Plaintiff is conclusively presumed to be disabled.
22 If the impairment is not one conclusively presumed to be
23 disabling, the evaluation proceeds to the fourth step, which
24 determines whether the impairment prevents Plaintiff from
25 performing work which was performed in the past. If a Plaintiff
26 is able to perform previous work, that Plaintiff is deemed not
27 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
28 At this step, Plaintiff's residual functional capacity ("RFC")

1 assessment is considered. If Plaintiff cannot perform this work,
2 the fifth and final step in the process determines whether
3 Plaintiff is able to perform other work in the national economy in
4 view of Plaintiff's residual functional capacity, age, education
5 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
6 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

7 The initial burden of proof rests upon Plaintiff to establish
8 a *prima facie* case of entitlement to disability benefits.

9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
10 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
11 met once Plaintiff establishes that a physical or mental
12 impairment prevents the performance of previous work. The burden
13 then shifts, at step five, to the Commissioner to show that (1)
14 Plaintiff can perform other substantial gainful activity and (2) a
15 "significant number of jobs exist in the national economy" which
16 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
17 Cir. 1984).

18 STANDARD OF REVIEW

19 Congress has provided a limited scope of judicial review of a
20 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
21 the Commissioner's decision, made through an ALJ, when the
22 determination is not based on legal error and is supported by
23 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
24 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
25 1999). "The [Commissioner's] determination that a plaintiff is
26 not disabled will be upheld if the findings of fact are supported
27 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
28 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence

1 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
2 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
3 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
4 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
5 573, 576 (9th Cir. 1988). Substantial evidence "means such
6 evidence as a reasonable mind might accept as adequate to support
7 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
8 (citations omitted). "[S]uch inferences and conclusions as the
9 [Commissioner] may reasonably draw from the evidence" will also be
10 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
11 On review, the Court considers the record as a whole, not just the
12 evidence supporting the decision of the Commissioner. *Weetman v.*
13 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
14 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

15 It is the role of the trier of fact, not this Court, to
16 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
17 evidence supports more than one rational interpretation, the Court
18 may not substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
20 (9th Cir. 1984). Nevertheless, a decision supported by
21 substantial evidence will still be set aside if the proper legal
22 standards were not applied in weighing the evidence and making the
23 decision. *Browner v. Secretary of Health and Human Services*, 839
24 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
25 evidence to support the administrative findings, or if there is
26 conflicting evidence that will support a finding of either

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1 disability or nondisability, the finding of the Commissioner is
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
3 1987).

4 **ALJ'S FINDINGS**

5 The ALJ found at step one that Plaintiff has not engaged in
6 substantial gainful activity since the alleged onset date, October
7 1, 1999. (AR 15). At step two, the ALJ found that Plaintiff has
8 the severe impairments of degenerative disc disease of the lumbar
9 and cervical spine, gastroesophageal reflux disease and obesity,
10 but that she does not have an impairment or combination of
11 impairments listed in or medically equal to one of the Listings
12 impairments. (AR 20). The ALJ specifically indicated that the
13 record does not establish that Plaintiff has a severe mental
14 impairment meeting the 12-month durational requirements of the
15 Social Security Act. (AR 20).

16 The ALJ concluded that Plaintiff has the RFC to perform a
17 wide range of light exertion work with occasional above shoulder
18 height work and no work around unprotected heights. (AR 22).

19 At step four of the sequential evaluation process, the ALJ
20 found that Plaintiff lacks the RFC to perform the exertional
21 requirements of her past relevant work as a stock clerk or bagger.
22 (AR 23). However, the ALJ determined that, within the framework
23 of the Medical-Vocational Guidelines ("Grids") and based on the
24 vocational expert's testimony and Plaintiff's RFC, age, education,
25 and work experience, there were a significant number of jobs in
26 the national economy which she could perform despite her

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1 limitations. (AR 23-24). Examples of such jobs included work as
2 a cashier II, a cafeteria attendant, and a ticket seller. (AR
3 24). Accordingly, the ALJ determined at step five of the
4 sequential evaluation process that Plaintiff was not disabled
5 within the meaning of the Social Security Act. (AR 24-26).

6 ISSUES

7 Plaintiff contends that the Commissioner erred as a matter of
8 law. Specifically, she argues that:

9 1. The ALJ erred by giving more weight to the opinion of
10 Dr. Almquist, a nonexamining physician, than to her treating
11 physician, Dr. Barry Bacon; and

12 2. The ALJ's opinion that Plaintiff is not fully credible
13 is erroneous and not properly supported.

14 This Court must uphold the Commissioner's determination that
15 Plaintiff is not disabled if the Commissioner applied the proper
16 legal standards and there is substantial evidence in the record as
17 a whole to support the decision.

18 DISCUSSION

19 **A. Reliance on Medical Expert**

20 Plaintiff contends that the ALJ erred by relying on the
21 opinions of a nonexamining medical advisor, Glen Almquist, M.D.,
22 and that the ALJ erred by not according more weight to the
23 opinions of treating physician, Barry J. Bacon, M.D. (Ct. Rec.
24 13, pp. 9-14). The Commissioner responds that the ALJ properly
25 evaluated the medical evidence and gave convincing reasons for
26 favoring the findings of Dr. Almquist over the disability opinion
27 of Dr. Bacon. (Ct. Rec. 16, pp. 10-12).

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1 The courts distinguish among the opinions of three types of
2 physicians: treating physicians, physicians who examine but do
3 not treat the claimant (examining physicians) and those who
4 neither examine nor treat the claimant (nonexamining physicians).
5 *Lester v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating
6 physician's opinion is given special weight because of his
7 familiarity with the claimant and his physical condition. *Fair v.*
8 *Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). Thus, more weight is
9 given to a treating physician than an examining physician.
10 *Lester*, 81 F.3d at 830. However, the treating physician's opinion
11 is not "necessarily conclusive as to either a physical condition
12 or the ultimate issue of disability." *Magallanes v. Bowen*, 881
13 F.2d 7474, 751 (9th Cir. 1989) (citations omitted).

14 The Ninth Circuit has held that "[t]he opinion of a
15 nonexamining physician cannot by itself constitute substantial
16 evidence that justifies the rejection of the opinion of either an
17 examining physician or a treating physician." *Lester*, 81 F.3d at
18 830. Rather, an ALJ's decision to reject the opinion of a
19 treating or examining physician, may be *based in part* on the
20 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d
21 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).
22 The ALJ must also have other evidence to support the decision such
23 as laboratory test results, contrary reports from examining
24 physicians, and testimony from the claimant that was inconsistent
25 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;
26 *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject the
27 testimony of an examining, but nontreating physician, in favor of
28 a nonexamining, nontreating physician only when he gives specific,

1 legitimate reasons for doing so, and those reasons are supported
2 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,
3 184 (9th Cir. 1995).

4 On December 9, 2003, Glen A. Almquist testified at the
5 administrative hearing as a medical expert. (AR 346-367). Dr.
6 Almquist opined that Plaintiff suffered from the severe impairment
7 of degenerative disc disease of the cervical spine, C5-6 and C6-7,
8 moderate, without significant radiculopathy, and minor
9 degenerative arthritis of the lumbosacral spine, L4-L5, without
10 radiculopathy. (AR 348). Dr. Almquist also noted obesity;
11 prescription drug addiction, severe and chronic, with probable
12 multiple secondary findings; headaches; abdominal pain and
13 fatigue. (AR 348). Dr. Almquist summarized the medical record
14 (AR 348-355) and noted that Plaintiff has been on an addicting and
15 high dose of narcotic medicine (AR 355). He stated that she had
16 recently been switched to methadone, a highly addictive drug. (AR
17 355). Dr. Almquist felt that the record did not reflect back pain
18 or neck pain symptoms that required addicting doses of medication.
19 (AR 355). It was Dr. Almquist's opinion that the pain management
20 chosen by Dr. Bacon resulted in an addiction to pain medication by
21 Plaintiff. (AR 359-361). However, Dr. Almquist also testified
22 that the good results from the epidural block reflected that
23 Plaintiff was not malingering and was not drug seeking at that
24 time. (AR 365). Dr. Almquist did not state that the record
25 displayed that Plaintiff exhibited drug-seeking behavior.

26 Dr. Almquist opined that Plaintiff, because of her cervical
27 spine issues, inactivity and weight, should be restricted to light
28 work with only occasional activity above shoulder-height. (AR

1 355-356). He indicated that there would be no restrictions in
2 bending, stooping, kneeling, crawling, or climbing, and no
3 restrictions on sitting, standing or walking, but that she should
4 not work at unprotected heights. (AR 356).

5 Dr. Almquist testified that he never discovered a physical
6 exam in Dr. Bacon's medical reports that was of any use. (AR
7 362). He indicated that most of Dr. Bacon's records contained
8 complaints and information from conversations with Plaintiff but
9 did not include any in-depth neurological examinations. (AR 362).

10 The ALJ found Dr. Almquist's testimony persuasive and,
11 accordingly, determined that Plaintiff retained the RFC to perform
12 light exertion work with occasional above shoulder height work.
13 (AR 22). By adopting the findings of Dr. Almquist and concluding
14 that Plaintiff could perform a wide range of light work, the ALJ
15 rejected the disability finding of Dr. Bacon. With regard to Dr.
16 Bacon, the ALJ found that Dr. Bacon's opinions were not persuasive
17 because his records show little in the way of physical
18 examinations, he is not a neurologist or orthopedist, his actual
19 examinations were sporadic and cursory, his assessments were based
20 on Plaintiff's self-reports, and his notes show that Plaintiff was
21 in no distress. (AR 22).

22 The record reveals that Dr. Bacon completed a general
23 examination of Plaintiff on November 10, 1999. (AR 171-172).
24 Plaintiff reported paresthesias in the left upper extremity, pain
25 and numbness radiating down the left arm, and an increase in
26 headaches and neck pain. (AR 171). Dr. Bacon diagnosed Plaintiff
27 with recent sinusitis, paresthesias of the left upper extremity
28 probably related to an old motor vehicle accident, palpitations,

1 low back pain, elevated blood pressure, fatigue, previous peptic
2 ulcer disease, and status post tubal ligation and left breast
3 surgery. (AR 172). Dr. Bacon also suggested x-rays of the neck
4 at that time. (AR 172). X-rays taken on November 11, 1999
5 revealed narrowing of the C5-6 and C6-7 intervertebral disc spaces
6 and identified posterior osteophyte at C5-6. (AR 186).

7 Dr. Bacon saw Plaintiff again on December 7, 1999. (AR 170).
8 Dr. Bacon reviewed the November 11, 1999 x-ray results with
9 Plaintiff and recommended an MRI of the cervical spine. (AR 170).
10 He also suggested a neurosurgical consultation. (AR 170). An MRI
11 taken on February 29, 2000, revealed some slight left sided
12 posterior protrusion of nuclear material and osteophytes at the
13 C5-6 level. (AR 185). There also appeared to be some mild left
14 sided herniation of nuclear material along with osteophytes at the
15 C5-6 and C6-7 levels and mild compression of the C6 and C7 nerve
16 roots on the left. (AR 185). Neural foramina could not be ruled
17 out conclusively. (AR 185).

18 On March 22, 2000, Plaintiff returned to Dr. Bacon regarding
19 the results of the February 29, 2000 MRI. (AR 168). Based on the
20 MRI, Dr. Bacon determined that Plaintiff had significant cervical
21 disc disease with left sided radiculopathy at the level of C6 and
22 C7. (AR 168). He felt that Plaintiff was in need of a
23 neurosurgical evaluation. (AR 168). On April 28, 2000, Dr. Bacon
24 saw Plaintiff and noted that she had an appointment with a
25 neurosurgeon and that he would like to see her following the
26 evaluation with the neurosurgeon. (AR 167).

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1 On May 26, 2000, Plaintiff was evaluated by Jeffrey J.
2 Larson, M.D. (AR 130-133). Dr. Larson reviewed the February 29,
3 2000 cervical MRI and noted that the MRI showed C5-6 spondylitic
4 disease with spurs. (AR 132). He diagnosed Plaintiff with C5-6
5 spondylosis. (AR 132). Dr. Larson stated that it was possible
6 that Plaintiff may benefit from surgical intervention, but, prior
7 to surgery, he suggested that she undergo right C6 selective nerve
8 root block with steroids. (AR 132).

9 On June 21, 2000, Dr. Bacon recommended that Plaintiff follow
10 through with Dr. Larson's conservative plan for an injection
11 around the suspected nerve root inflammation. (AR 166). He noted,
12 however, that he was convinced that it was a cervical disc that
13 was causing the symptoms and that surgery would be of benefit to
14 her. (AR 166).

15 On September 27, 2000, Dr. Larson indicated that after the
16 nerve root block, Plaintiff had temporary relief of her symptoms
17 and was doing pretty well. (AR 127). He stated that she was a
18 candidate for anterior cervical discectomy and fusion at C5-6 if
19 her symptoms recur. (AR 127).

20 On January 27, 2001, Dr. Larson again saw Plaintiff. (AR
21 126). He indicated that she had approximately eight weeks of pain
22 improvement after her nerve root block. (AR 126). However, she
23 continued to complain of neck and arm pain which waxed and waned.
24 (AR 126). Dr. Larson diagnosed C5-6 spondylosis and indicated
25 that Plaintiff could continue with conservative care or opt to
26 consider an anterior cervical discectomy and fusion at C5-6. (AR
27 126).

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1 On February 12, 2001, Plaintiff returned to Dr. Bacon
2 complaining of neck pain. (AR 158). Dr. Bacon diagnosed
3 Plaintiff with neck pain with a herniated disc and some
4 encroachment on the nerve roots to both arms and low back pain.
5 (AR 158). Dr. Bacon saw Plaintiff on April 12, 2001 for intense
6 headaches. (AR 157). It was noted that Plaintiff had been trying
7 a chiropractor which did not seem to help her with her neck pain.
8 (AR 157). She was seen again on May 11, 2001, for intense
9 headaches. (AR 156). Dr. Bacon noted on June 11, 2001, that
10 Plaintiff complained of fatigue and exhaustion and noted that
11 Plaintiff sleeps a lot without much relief. (AR 155). Dr. Bacon
12 diagnosed plantar fasciitis, increased weight, exhaustion and
13 fatigue, right upper abdominal pain intermittently, and chronic
14 low back pain. (AR 155). On August 7, 2001, Plaintiff complained
15 of ongoing neck pain. (AR 154). On August 22, 2001, Plaintiff
16 reported to Dr. Bacon complaining of heart palpitations. (AR
17 153). On September 12, 2001, Dr. Bacon noted that Plaintiff
18 complained of headaches, fatigue, and neck pain. (AR 152).

19 On November 20, 2001, Plaintiff was given a general
20 examination by Dr. Bacon. (AR 149-150). Dr. Bacon diagnosed
21 Plaintiff with chronic pain management particularly due to the
22 chronic neck pain with radiculopathy symptoms, cervical disc
23 disease, fatigue, perhaps some depression, occasional nocturnal
24 wheezing, GERD, allergy to Ceclor, chronic tobacco abuse, history
25 of gestational diabetes, fibrocystic breast disease and left foot
26 injury, puncture. (AR 150). On January 4, 2002, Plaintiff
27 reported complaining of headaches, neck pain, poor sleeping and a
28 swollen head. (AR 148).

1 On January 28, 2002, Dr. Bacon noted that Plaintiff continued
2 to complain of headaches which she described as escalating and
3 becoming worse. (AR 146). Plaintiff indicated that the
4 headaches had been terrible and at times nothing relieved them.
5 (AR 146). Dr. Bacon diagnosed intermittent headaches, severe in
6 nature, unrelenting, unresponsive to the present pain management.
7 (AR 146). He suggested an MRI of the brain. (AR 146). An MRI of
8 Plaintiff's brain was completed on February 22, 2002. (AR 177).
9 Results revealed a negative cranial MRI. (AR 177).

10 On March 7, 2002, Dr. Bacon saw Plaintiff for headaches
11 described as "excruciating, extremely painful, basically on a
12 daily basis." (AR 145). Plaintiff was again seen by Dr. Bacon on
13 April 15, 2002, and May 16, 2002, complaining of very severe
14 headaches. (AR 142-144).

15 On May 1, 2002, Allan Troupin, M.D., completed a neurological
16 evaluation of Plaintiff. (AR 138-139). Dr. Troupin assessed
17 Plaintiff with bilateral occipital neuralgia. (AR 138). He
18 indicated that it was solely a mechanical postural problem that
19 did not respond to medication and not uncommonly associated with
20 some degree of cervical osteoarthritis and radiculopathy. (AR
21 138). Dr. Troupin opined that Plaintiff's headaches would respond
22 to home seated cervical traction. (AR 138-139).

23 Dr. Bacon saw Plaintiff on July 8, 2002, regarding her
24 ongoing neck pain and headaches. (AR 141). Dr. Bacon diagnosed
25 Plaintiff with cervical radiculopathy. (AR 141). He recommended
26 a repeat MRI of the cervical spine. (AR 141).

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1 An MRI was completed on July 19, 2002. (AR 176). Results
2 revealed slightly more prominent herniation to the right at C6-7
3 with some mild foraminal narrowing on the right, a little more
4 prominence of the left paracentral bulge or herniation of the disc
5 at C4-5, and left paracentral herniation at C5-6 which was
6 somewhat broad based and creating some mild to moderate foraminal
7 narrowing on the left side and just mild narrowing on the right.
8 (AR 176). There was also a mild amount of vertebral spondylosis.
9 (AR 176).

10 On October 22, 2002, Dr. Bacon completed a form at the
11 request of the Department of Social and Health Services. (AR
12 223). Dr. Bacon indicated that Plaintiff had cervical and lumbar
13 disc disease, opined that Plaintiff was not able to do her past
14 work, and concluded that treatment could possibly restore her
15 ability to work. (AR 223).

16 On March 5, 2003, Dr. Bacon completed a disability statement
17 for a property tax exemption and indicated that Plaintiff was
18 considered to be disabled and unable to be regularly employed due
19 to chronic neck disc disease. (AR 224). He stated that her
20 disability began on November 1, 1999 and was expected to continue
21 the rest of her life. (AR 224).

22 Although Dr. Bacon is not a neurologist or orthopaedist, he
23 is Plaintiff's long-time treating physician. *Supra*. As noted
24 above, a treating physician's opinion is given special weight
25 because of his familiarity with the claimant and her physical
26 condition. *Fair*, 885 F.2d at 604-05. A regular, treating
27 physician is in the best position to assess an individual's level
28 of functioning. Furthermore, Dr. Bacon referred Plaintiff to an

1 orthopaedist, Dr. Larson, for a consultative examination, and Dr.
2 Larson verified Plaintiff's neck problems and recommended
3 conservative treatment and, if necessary, surgery. (AR 127). Dr.
4 Bacon's later opinions are based on findings made by Dr. Larson.
5 Therefore, the ALJ's rejection of Dr. Bacon's findings because he
6 is not a neurologist or orthopedist is not legitimate.

7 The undersigned simply does not concur with the ALJ's
8 statement that Dr. Bacon's examinations were sporadic and cursory
9 and his assessments were based on Plaintiff's reporting. (AR 22).
10 Dr. Bacon saw Plaintiff on several occasions since 1999, he
11 completed yearly physical examinations, referred her for
12 consultative examinations, and ordered x-rays and MRI's. *Supra*.
13 Dr. Bacon's opinions were surely based in part on Plaintiff's
14 reporting, but they were also based on his examinations and the
15 results from x-rays, MRI's and the reports of physicians Dr. Bacon
16 referred Plaintiff to.

17 In addition, as noted above, the Ninth Circuit has held that
18 "[t]he opinion of a nonexamining physician cannot by itself
19 constitute substantial evidence that justifies the rejection of
20 the opinion of either an examining physician or a treating
21 physician." *Lester*, 81 F.3d at 830. Here, the ALJ has failed to
22 provide any evidence, other than the opinions of the non-examining
23 medical expert, Dr. Almquist, to support her RFC determination.
24 Dr. Almquist's findings are contrary to the opinions of treating
25 physician Dr. Bacon and to the weight of the evidence of record.
26 Accordingly, the undersigned finds that the ALJ's rejection of Dr.
27 Bacon's opinions was erroneous, the ALJ's reliance on Dr. Almquist

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1 was misplaced, and the ALJ's ultimate RFC determination is not
2 based on substantial record evidence.

3 When the Commissioner fails to provide adequate reasons for
4 rejecting the opinion of a treating or examining physician, that
5 physician's opinion is credited as a matter of law. *Lester v.*
6 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). Dr. Bacon opined on
7 October 22, 2002, that Plaintiff was not able to do her past work.
8 (AR 223). On March 5, 2003, Dr. Bacon completed a disability
9 statement indicating that Plaintiff was considered to be disabled
10 and unable to be regularly employed. (AR 224). He stated that
11 her disability began on November 1, 1999 and was expected to
12 continue for the rest of her life. (AR 224). Dr. Bacon's
13 opinions regarding Plaintiff's functioning are thus credited. In
14 light of Dr. Bacon's credited opinions, it is apparent that the
15 ALJ's determination in this case is erroneous.

16 **B. Credibility**

17 Plaintiff argues that the ALJ's opinion that Plaintiff is not
18 fully credible is not properly supported. (Ct. Rec. 13, pp. 14-
19 16). Plaintiff specifically argues that the ALJ failed to give
20 appropriate rationale for finding her allegations of fatigue
21 unconvincing. (*Id.*) The Commissioner responds that the ALJ
22 appropriately gave clear and convincing reasons to discredit
23 Plaintiff's testimony. (Ct. Rec. 16, pp. 7-9).

24 It is the province of the ALJ to make credibility
25 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
26 1995). However, the ALJ's findings must be supported by specific
27 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.

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1990). Once the claimant produces medical evidence of an underlying impairment, the ALJ may not discredit her testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

The ALJ determined that Plaintiff's allegations regarding her pain and limitations were less than fully credible. (AR 21-22). In support of this finding, the ALJ indicated as follows:

(1) Plaintiff's testimony of significant pain, even with pain medication, was indicative of over reporting; (2) Plaintiff's pain complaints were not supported by the medical evidence of record; (3) Plaintiff's treating physician expressed concern about the amount of narcotics Plaintiff had been taking and the medical expert noted problems with prescription drug abuse; (4) Plaintiff's failure to reveal an intervening injury following her early motor vehicle accident is contradicted by other evidence in the record; (5) Plaintiff's reports of limitations and disabling pain were contradicted by her activities; and (6) although Plaintiff complained of fatigue, there was no explanation for her daytime sleepiness. (AR 21-22).

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1 It is significant to note, as indicated by the Commissioner,
2 although Plaintiff reported severe functional limitations, she
3 testified that she home-schooled her nine-year-old son. (AR 21,
4 390-391; Ct. Rec. 16, p. 7). The Commissioner also pointed out
5 that Plaintiff testified that she could sit only five minutes
6 before needing to move, but had ridden in a car for two hours in
7 order to attend the administrative hearing. (AR 380-381; Ct. Rec.
8 16, p. 7).

9 The ALJ is responsible for reviewing the evidence and
10 resolving conflicts or ambiguities in testimony. *Magallanes v.*
11 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). If evidence supports
12 more than one rational interpretation, the court must uphold the
13 decision of the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9th
14 Cir. 1984). It is the role of the trier of fact, not this Court,
15 to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400.
16 The Court thus has a limited role in determining whether the ALJ's
17 decision is supported by substantial evidence and may not
18 substitute its own judgment for that of the ALJ even if it might
19 justifiably have reached a different result upon de novo review.
20 42 U.S.C. § 405(g).

21 After reviewing the record, the undersigned judicial officer
22 finds that the reasons provided by the ALJ for discounting
23 Plaintiff's subjective complaints are sufficient and supported by
24 substantial evidence in the record. Accordingly, the undersigned
25 finds that the ALJ did not err by concluding that Plaintiff's
26 subjective complaints regarding the extent of her functional
27 limitations were not fully credible in this case. (AR 21-22).

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1 **C. Ability to Work**

2 As noted in Section A above, the ALJ failed to give specific
3 and legitimate reasons for rejecting the opinions of Dr. Bacon.
4 *Supra.* In light of the opinions of this treating physician, it is
5 apparent that Plaintiff is much more limited than as assessed by
6 the ALJ. After crediting Dr. Bacon's opinions, a review of the
7 record reveals that Plaintiff is not able perform her past work.
8 (AR 223-224).¹ Moreover, the issue of whether Plaintiff is
9 capable of performing other work is resolved by crediting the
10 opinions of Dr. Bacon, Plaintiff's long-time treating physician.
11 Dr. Bacon completed a form at the request of the Department of
12 Social and Health Services indicating that Plaintiff had cervical
13 and lumbar disc disease and that Plaintiff was not able to do her
14 past work. (AR 223). On March 5, 2003, Dr. Bacon completed a
15 disability statement form opining that Plaintiff was considered to
16 be disabled and unable to be regularly employed due to chronic
17 neck disc disease. (AR 224). Dr. Bacon stated that Plaintiff's
18 disability began on November 1, 1999 and was expected to continue
19 the rest of her life. (AR 224). As such, it is apparent from the
20 record that there is no job in the national economy for which
21 Plaintiff is capable of working. Accordingly, the undersigned
22 finds that further development is not necessary for a proper
23 determination to be made in this case.

24 **CONCLUSION**

25 Plaintiff argues that the ALJ's errors should result in this
26 Court reversing the ALJ's decision and awarding benefits. (Ct.

27
28 ¹In fact, the ALJ came to the conclusion that Plaintiff would be unable
to perform her past relevant work even with the RFC determination that
Plaintiff could perform a significant range of light exertion work. (AR 25).

1 Rec. 13). The Court has the discretion to remand the case for
2 additional evidence and finding or to award benefits. *Smolen v.*
3 *Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award
4 benefits if the record is fully developed and further
5 administrative proceedings would serve no useful purpose. *Id.*
6 Remand is appropriate when additional administrative proceedings
7 could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th
8 Cir. 1989). In this case, the record is adequate for a proper
9 determination to be made and further development is not necessary
10 to remedy defects.

11 Having reviewed the record and the ALJ's decision, this Court
12 finds that the ALJ erred by rejecting the opinions of Dr. Bacon.
13 When Dr. Bacon's opinions are properly credited, the evidence
14 supports an immediate award of benefits. Accordingly,

15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
17 **GRANTED** and the case is **REMANDED** for an immediate award of
18 benefits.

19 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**)
20 is **DENIED**.

21 3. Judgment shall be entered for **PLAINTIFF**. An application
22 for attorney fees may be filed by separate motion.

23 4. The District Court Executive is directed to enter this
24 Order, provide a copy to counsel for Plaintiff and Defendant, and
25 **CLOSE** the file.

26 **DATED** this 19th day of April, 2006.

27 _____
s/Michael W. Leavitt

28 MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE